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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-745

BILLY R. TORRENCE,
Petitioner,

vs.

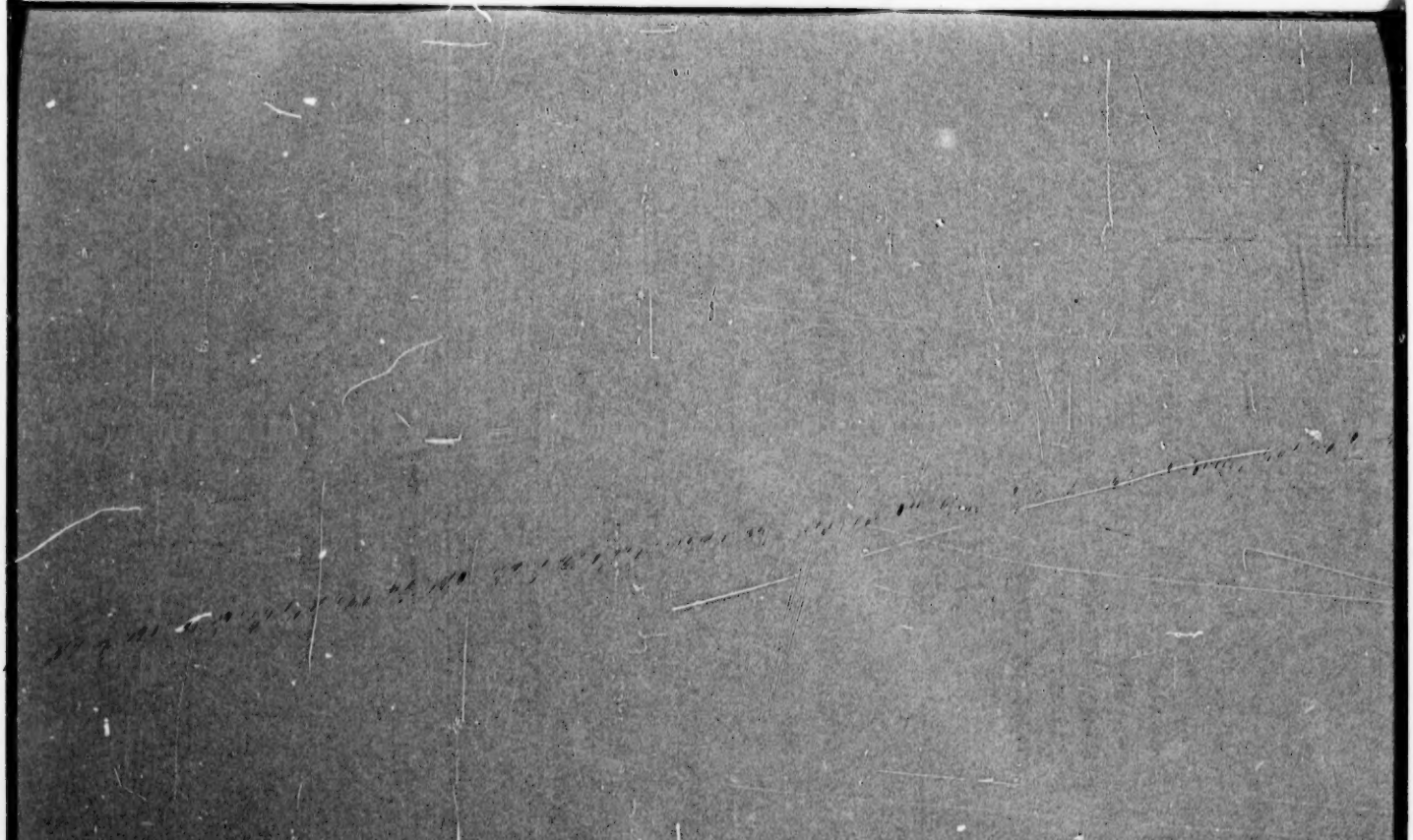
STATE OF NEBRASKA,
Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF NEBRASKA

BRIEF OF PETITIONER, BILLY R. TORRENCE

PATRICK W. HEALY
1141 H Street
Lincoln, Nebraska
and
DUANE L. NELSON
420 Sharp Bldg.
Lincoln, Nebraska
Attorneys for Petitioner

GANT PUBLISHING COMPANY, 1630 N Street, Lincoln, Nebraska 68508



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OPINION BELOW

The opinion of the Nebraska Supreme Court, *State v. Torrence*, 192 Neb. 213 (1974), is included in the appendix hereto, at page 24.

JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on July 5, 1974, affirming petitioner's conviction and sentence to 15 years imprisonment. A timely motion for rehearing was denied by the Nebraska Supreme Court on September 17, 1974, and this petition for certiorari is filed within ninety days of that date. This Court has jurisdiction under 28 U. S. C. 1257(3).

QUESTIONS PRESENTED

1. Whether an unannounced search of a residence where petitioner and others were located, under a search warrant issued and purportedly authorized by Nebraska's "no-knock" warrant statute, Sec. 29-411, R. R. S. 1943 (Neb.) (1972 Supp.), is an unreasonable search when in fact there were no exigent circumstances when the officers executing the warrant made their unannounced entry.

2. Whether a denial of due process of law under the Fourteenth Amendment to the United States Constitution occurs when:

(a) A prejudicial statement obtained from petitioner by questioning immediately or shortly after he was beaten on the head with a nightstick by police, which beating occurred after he was under arrest and handcuffed and was totally without justification, and without the petitioner having been advised on any rights he had as an arrested person, is admitted into evidence against him.

(b) Motions for change of venue and to have the jurors questioned individually outside the presence of other jurors are denied even though virtually the entire panel of prospective jurors, and all twelve trial jurors, had been exposed to inflammatory pretrial publicity.

(c) The prosecution pursues a course of conduct, permitted by the court, which is calculated to unfairly prejudice the petitioner, including the following, in addition to matters previously discussed:

(1) Deliberate elicitation of highly prejudicial and obviously inadmissable hearsay testimony implicating petitioner in commission of another offense, with the trial

judge refusing to declare a mistrial but simply admonishing the jury to disregard such testimony;

(2) Deliberate contriving to deny release on bail prior to trial;

(3) Trial with a co-defendant whose defense involved implication of petitioner;

(4) Introduction of evidence of police investigations and opinions regarding narcotics traffic;

(5) Introduction of critical fingerprint identification evidence in direct conflict with established rules of evidence and for the apparent purpose of informing the jury of a prior arrest.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. United States Constitution, Amendment XIV, Sec. 1.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or prop-

erty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 29-411, R. R. S. 1943 (Neb.) (1972 Supp.).

29-411. Warrants; execution; powers of officer; direction for executing. In executing a warrant for the arrest of a person charged with an offense, or a search warrant, or when authorized to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance; or without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice, but the political subdivision from which such officer is elected or appointed shall be liable for all damages to the property in gaining admission. The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice be given; but this section is not intended to authorize any officer executing a search warrant to enter any house or building not described in the warrant.

STATEMENT OF THE CASE

The petitioner stands convicted of a charge of possession of heroin with intent to sell or deliver. He was arrested on April 6, 1973, while at the rented home of one Elton Love, who was present along with his wife and two other persons. On that day, some nineteen Omaha, Nebraska, police officers raided the Love residence by battering in the doors and windows without giving any notice of their authority or purpose. In an

ensuing search, the police seized a quantity of heroin and paraphernalia, which was introduced into evidence at the trial over petitioner's objection and after his motion to suppress evidence was denied. Petitioner's Motion to Suppress is set forth in the appendix hereto at page 28, and is found at page 29 of the Transcript from the District Court of Douglas County (T29); the Court's ruling is at T29 and in the court reporter's transcript at page 43 (R43).

The unannounced raid and search was purportedly authorized by a search warrant issued the same day by Omaha Municipal Judge Walter Cropper pursuant to Sec. 29-411, R. R. S. 1943 (Neb) (1972 Supp.), which authorizes execution of a search warrant without notice of authority and purpose and by breaking open any outer or inner door or window, if the judge so directs, the only limitations being that such a warrant shall issue only upon a finding that the property sought may be easily destroyed or disposed of, or that danger to the life or limb of the officer or another may result if such notice is given. A copy of the search warrant is included in the appendix hereto at page 31. The basis for authorizing the warrant on a "no knock" basis was a conclusion that the property sought could be easily destroyed because of the presence of toilet facilities in the Love residence (although the supporting affidavit makes no mention of such facilities).

In executing the warrant, nineteen police officers were stationed at the front and back doors of the house. There were no signs of elusive action, such as retreating footsteps, from within the house to indicate a possible escape. The search warrant made no reference to possible danger to the life or limb of an officer or another.

Almost immediately after the "no knock" raid began, the petitioner was arrested by three police officers. He offered no resistance and cooperated fully. While the three officers were handcuffing him behind his back, a fourth officer hit him on the head with his nightstick. Shortly thereafter, and without any warnings concerning his rights as an arrested person having been given to petitioner, Officer Parker addressed him with the accusation: "Billy, I have been trying to get you for three years and I think I got you." Petitioner allegedly responded: "You got me good, Mr. Parker." Parker and petitioner had known each other for three years, during which time Parker was openly trying to make a case against petitioner. The accusation and response were introduced into evidence over objection (R370). The existence of the oral statement was revealed at the hearing on the motion to suppress evidence, at which time counsel for petitioner reserved any objection until trial.

Upon appeal, the Nebraska Supreme Court held that the statement was admissible, indicating that it was "equivocal" and "spontaneous and voluntary in nature and not the result of interrogation" and that the failure to advise petitioner of his rights was not error. The Court simply failed to deal with the question of the effect of the police violence in obtaining the statement.

Pretrial publicity in Omaha, Nebraska, concerning the petitioner, depicting him as a big-time trafficker in narcotics, was considerable. Twenty-nine of the thirty-three jurors called for selection of the jury had read or heard publicity in advance. All twelve of the trial jurors had been exposed to advance publicity.

Prior to trial, petitioner on May 29, 1973, moved for a change of venue, as follows: "Defendant moves: I. That

he be granted a change of venue for the reason that he cannot receive a fair trial in Douglas County, Nebraska, because of substantial adverse publicity in all of the local news media inclusive of newspapers, television and radio since his arrest on April 6, 1973," (T35). The Court deferred ruling until after voir dire examination of the jurors; although the result of such examination was as indicated above, the motion was denied at that time (T37). As the process of impaneling the jury began, petitioner joined counsel for a co-defendant in a motion to the court "to order that the voir dire of the prospective jurors proceed singly as to each juror and each juror be questioned and outside of the presence of the rest of the Jury Panel which is now in the court room, for the reason that due to the nature of the case, the severity of the charge, the recent publicity attendant upon this type of prosecution, that I feel on behalf of my client we could not attain a fair and impartial Jury if the questioning were had in a group and in the presence of all of the other potential jurors." The motion was summarily overruled (R51).

The Nebraska Supreme Court handled this issue by observing that all the jurors said that they would not be influenced by what they had read or heard and stating that "it is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in Court" and that "It is not required that jurors be totally ignorant of the facts and issues involved."

During the trial, a police officer testified upon cross-examination by co-defendant that during surveillance involving the petitioner they were observing radio silence. The prosecuting attorney then asked the officer why the radio was silent. He responded, over objection, that: "Well, I received information from a party that worked

on the North Side that Mr. Torrence had a Police monitor and did receive our radio calls." The Court granted petitioner's motion to strike and stated "The Jury will please disregard that statement." Petitioner's motion for a mistrial was denied (R500-503).

Petitioner was held in custody after his arrest with his bond fixed at $25,000. While he was trying to raise bail, a previously dismissed charge was resurrected and additional bail totalling $26,000 was set. He arranged to provide bonds for all offenses, and was met by a prosecution move to double his bail on the instant charge and to require separate sureties for the different offenses. No new evidence or information justifying an increase was presented. The Court in fact raised the bond to $35,000 and further ruled that the surety could not require a premium or security in excess of 10% of the total of the bonds. Upon questioning, the bondsman had stated that he had obtained security in the form of pledges of real estate well in excess of that amount.

Petitioner was unable to obtain his release under the raised bail and the conditions imposed by the Court; he unsuccessfully prosecuted an original action of the State Supreme Court to obtain his release on bail. He moved for a continuance of the trial in order to pursue his purpose to obtain his release (T34), which was denied (T36).

Prior to trial, the prosecution moved to consolidate petitioner's trial with that of other defendants, which was granted by the Court. In fact, one other person stood trial with him. During the course of the trial and in argument, co-defendant's counsel repeatedly took a course of action calculated to help the prosecution convict petitioner. During jury selection, the prosecutor in effect admitted that petitioner was his prime target. A number

of objections by petitioner to testimony of police surveillance of petitioner and other prejudicial matter brought out by co-defendant were overruled (R336, 339, 347); petitioner's motion for a mistrial based upon co-defendant's final argument was overruled (R756).

During the trial, the prosecution was permitted, over objection of defendant, to adduce extensive evidence of police surveillance of the petitioner which had no probative value other than to establish that the police regarded him as a prime suspect, and to bring out opinion evidence from a police officer with no demonstrated expertise regarding narcotics dealing.

One significant piece of evidence consisted of an opinion by a police lab expert that a fingerprint found on a plate of glass seized in the house, upon which a considerable quantity of heroin and paraphernalia was found, was the petitioner's. Petitioner was fingerprinted by police twice between the time of his arrest and the trial. However, the prosecution did not use either of those sets of prints to use as standard against which to compare the latent print, but used prints resulting from a 1958 arrest. No foundation was laid to establish these as belonging to petitioner, except by testimony of an out of court comparison with post-arrest prints in this case. Objection was made to the officer's opinion and to a comparison exhibit containing a photograph of the 1958 print on the basis of lack of foundation, both of which objections were overruled by the Court (R711).

The trial of the petitioner was held on May 29 - June 6, 1973, and resulted in a guilty verdict. His co-defendant was acquitted. Subsequently, petitioner filed a timely motion for new trial, in pertinent part, as follows (T63):

Comes now the defendant herein and respectfully moves the Court for a new trial for the following reasons and each of them:

1. The Court erred in failing to sustain defendant's motion to suppress the evidence;

2. The Court erred in failing to grant defendant's motion for a directed verdict at the close of the State's evidence;

3. The Court erred in failing to grant defendant's motion for a directed verdict at the close of the defendant's evidence;

4. The Court erred in submitting the cause to the jury;

5. The Court erred in failing to grant defendant's motion for mistrial during the course of the trial;

9. That the verdict of the jury is contrary to the law;

10. That the verdict of the jury is contrary to the evidence;

11. That the verdict returned by the jury in favor of the State, fails to do substantial justice and an injustice to the defendant . . .

Upon appeal to the Nebraska Supreme Court, the following Assignments of Error were set out (Appellant's Brief, pp. 2-4):

1. The Court erred in ordering this case consolidated for trial with the case of *State v. Lydia Hatcher*, Doc. 87, No. 127.

2. The Court erred in denying defendant's motion for change of venue.

3. The Court erred in overruling defendant's motion to suppress evidence obtained under a no-knock search warrant based on information from an undisclosesd informant.

5. The Court erred in denying defendant's motion for a continuance.

6. The Court erred in admitting prejudicial and hearsay evidence of activities of defendant not related to the offense charged.

7. The Court erred in permitting a police officer to testify as an expert witness to hearsay opinions concerning narcotics trafficking.

8. The Court erred in admitting evidence of an oral statement made by defendant while under arrest.

11. The Court erred in denying defendant's motion for a mistrial based on deliberate elicitation by the State of highly prejudicial and obviously inadmissible evidence.

12. The Court erred in admitting fingerprint indentification evidence without proper foundation.

13. The Court erred in denying defendant's motions for judgment of acquittal because of insufficient evidence.

14. The Court erred in overruling defendant's motion for a new trial.

That petitioner was raising Federal Constitutional ques-

tions is set out in the following Propositions of Law (Appellant's Brief, pp. 4-8):

II.

A change of venue should be granted where voir dire examination of jurors reflects that a large majority had read or heard recent and inflammatory reports concerning the defendant and the alleged offense.

Marshall v. United States, 360 U. S. 10 (1959).
Williams v. State, 283 S. W. 2d 239 (Tex.).
State v. Shawan, 423 P. 2d 39 (N. M.).
ABA Standards Relating to Free Trial and Free Press.

III.

Evidence obtained pursuant to a no-knock search warrant based upon information obtained from an undisclosed informant not demonstrated to be reliable should be suppressed.

Ker v. California, 374 U. S. 23.
Roviaro v. United States, 353 U. S. 53.
State v. Holloway, 187 Neb. 1.
U. S. Constitution, Amendments 4 and 14.

VII.

An alleged admission by a defendant made when he is under arrest and has been beaten with a night stick by police cannot be admitted into evidence against him in the absence of and affirmative showing that he has been advised of his rights or that the statement was clearly voluntary.

Miranda v. Arizona, 384 U. S. 436.
Orozco v. Texas, 394 U. S. 1.
Malloy v. Hogan, 378 U. S. 1.
Stagemeyer v. State, 137 Neb. 882.

XII.

The trial of the defendant was conducted in such a manner as to constitute a denial of due process of law and which resulted in his being convicted upon insufficient evidence.

U. S. Constitution, 14th Amendment.
Constitution of Nebraska, Art. I, Sec. 6.
Rochin v. California, 342 U. S. 165.

The Constitutional questions were fully argued in Appellant's Brief, Reply Brief, and Brief on Motion for Rehearing. That the trial errors referred to in Question 2 herein were made the basis of a Federal due process argument is set forth in Appellant's original brief, as follows:

> . . . (T)he State undertook and was allowed to prove defendant's guilt by a coerced admission, testimony of police opinion about him, unsubstantiated hearsay about narcotics trading, and improper expert testimony. This evidence was presented to a jury which had been exposed to repeated recent publicity about the defendant and his supposed major role in narcotics distribution. It was done while he was wrongly confined in jail. The County Attorney deliberately brought out inflammatory inadmissible evidence to help persuade the jury. The defendant was tried with another defendant who helped convict him.
>
> The totality of circumstances demonstrates an absence of fairness, amounting to a denial of due process of law under Article I, Section 6, Constitution of Nebraska, and the 14th Amendment to the United States Constitution; see *Rochin v. California*, 342 U. S. 165.

ARGUMENT

I.

The decision of the Nebraska Supreme Court, holding

that evidence obtained pursuant to an unannounced entry of a dwelling is admissable at trial solely because the issuing judge feels the property being sought is of a type that can easily be destroyed, is clearly erroneous; this Court has never allowed such a search and seizure to stand, and has not yet clearly delineated the circumstances, if any, under which police may be permitted to dispense with the general constitutional requirement of announced authority and purpose under so-called "no knock" statutes.

At the time of the entry in question, the petitioner was in a friend's home. Under *Jones v. United States,* 362 U. S. 257 (1960), he may rely on the 4th Amendment's prohibition against unreasonable searches and seizures

It was firmly established long before the adoption of the Bill of Rights that the fundamental liberty of the individual includes protection against unannounced police entry. See, e.g., *Semayne's Case,* 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194 (1603); *Frank v. Maryland,* 359 U. S. 360, 376-382 (1959) (dissenting opinion); Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361 (1921). The principle was confirmed not long after the 4th Amendment became part of our Constitution. See, *Launock v. Brown,* 2 B. & Ald. 592, 106 Eng. Rep. 482 (1819). In *Boyd v. United States,* 116 U. S. 616, 630 (1886), this Court said: "The protections of individual freedom carried into the Fourth Amendment undoubtedly included this firmly established requirement of an announcement by police officers of purpose and authority before breaking into an individual's home."

In this case, the requirement of announcement before entry was ignored. The search and seizure was there-

fore unreasonable unless the "fear of destroying evidence" is an exception to the long established rule. Such exceptions are not to be lightly inferred, as recognized by Justice Brennan in his opinion in *Ker v. California*, 374 U. S. 23, 53 (1963): "Rigid restrictions upon unannounced entries are essential if the Fourth Amendment's prohibition against invasion of the security and privacy of the home is to have any meaning." See also *Miller v. United States*, 357 U. S. 301, 313 (1958), where the Court stated: "The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application."

In the case at bar, the judge issuing the warrant exercised the authority purportedly given him by Sec. 29-411, R. R. S. 1943 (Neb.) (1972 Supp.) to authorize unannounced entry solely because the investigation involved narcotics. The mere involvement of narcotics has been held by this Court to not justify an exception to the Constitutional requirement for a warrant prior to a search; *Vale v. Louisiana*, 399 U. S. 30 (1970). The question, heretofor unanswered by this Court, of whether such involvement justifies an exception to the requirement of announcement of entry is squarely presented. As the Statement above points out, there are no facts to show that the officers had any reason, such as observed elusive action, as was present in *Ker v. California*, supra, to dispense with notice. In view of the proliferation of "no knock" statutes, and the long standing and firmly established principle that Constitutional guarantees against unreasonable searches and seizures are to be liberally construed in favor of the individual to safeguard the right of privacy, it is submitted that certiorari should be granted and this issue thoroughly briefed and explored. In view

of the long history of Constitutional decisions recognizing the announcement requirement, including the recent State court decision in *Coleman v. Reilly,* 8 Wash. App. 684, 508 P. 2d 1035 (1974), it is submitted that the search herein will, upon examination, be found to have been unreasonable. Under *Mapp v. Ohio,* 367 U. S. 643 (1961), the evidence therefore should have been excluded.

II.

The Nebraska Supreme Court ruling that petitioner's oral admission, obtained immediately after his arrest and beating by police, was admissable, was clearly erroneous and constitutes a denial of due process of law under the 14th Amendment.

The treatment by the Nebraska Court of this issue is shocking. The entire discussion by that Court, after acknowledging the salient facts, consists of the following paragraph:

> "In Miranda v. Arizona, 384 U. S. 436 . . . the United States Supreme Court held specifically that volunteered statements of any kind are admissable without prior explanation the defendant's rights. The defendant's reply was equivocal, but in any event it was spontaneous and voluntary in nature and not the result of interrogation. The objection was properly overruled."

In this case, the State made absolutely no showing of the circumstances surrounding the statement except that it was obtained shortly after arrest and the clubbing on the head, and without any advice having been given the petitioner. The Nebraska Court violated its own established rule (which to petitioner's knowledge is a universal rule) that the prosecution must affirmatively establish all that occurred immediately prior to and at the time

of the making of the confession, which proof must show it to have been freely and voluntarily made and exclude the hypothesis of improper inducements or threats; *Holthus v. State,* 138 Neb. 200, 292 N. W. 603. It totally ignored cases such as *Brown v. Mississippi,* 297 U. S. 278 (1936), and *Malloy v. Hogan,* 378 U. S. 1,7, where the Court stated that a statement "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

The Nebraska Court also wildly misapplied *Miranda v. Arizona,* supra. By what stretch of the imagination can a challenging accusation such as that made here be passed off as not being interrogation? The characterization of the statement as "equivocal" is simply wrong; in any event, *Miranda* clearly applies to any statement that might be incriminating; 384 U. S. at 467. The characterization of the statement as "spontaneous and voluntary" apparently means that henceforth Nebraska police will be authorized to obtain confessions by striking suspects on the head, because of a "misunderstanding", and then hoping they will respond to attempts at conversation, so long as formal questions are avoided. The Nebraska Court has apparently ruled that *Miranda* constituted a retreat from the prohibition against the use of violence in obtaining incriminating statements. It is contrary to every decision of this Court dealing with police-obtained admissions and must be repudiated. An important Federal question is involved.

III.

Trial to a jury exposed to extensive prejudicial pretrial publicity constituted a denial of due process of law.

The publicity to which 29 of the 33 prospective jurors, and all 12 trial jurors were exposed was a great deal more than mere news of petitioner's arrest. It depicted him as a prime narcotics dealer. Included were a front page story in the only major newspaper in Omaha on April 6; an article on the front page of the second section of the same paper on April 7 which stressed petitioner's alleged involvement and included a picture of an expensive automobile purportedly owned by him; an article on April 12, concerning allegations that petitioner owed $1,000,000 in taxes; a feature entitled "The Torrence Story" on April 15; an April 26 story on his unsuccessful bond hearing; and a May 23 article concerning his Supreme Court case concerning bail. Television and radio also covered the story, and just before trial, a feature front-page story on Officer Swanson, the narcotics squad chief and the State's star witness, appeared in the Omaha Sun.

In the circumstances, some corrective action beyond voir dire examination was called for. Petitioner specifically moved for a change of venue to meet the problem; he also requested a continuance (although for a different reason), which would have alleviated the problem to some extent. He also moved to have the voir dire so conducted that all of the jurors would not be fully informed of his media notoriety. All were denied.

In *Marshall v. United States*, 360 U. S. 10 (1959), seven jurors were subjected to prejudicial news reports concerning the defendant. Although the trial judge elicited assurances that the publicity would not affect them, this Court held that a fair trial could not be had. See also *Williams v. State*, 162 Tex. Crim. 202, 283 S. W. 2d 239 (1955), where five of the trial jurors had seen prejudicial reports, and *State v. Shawan*, 77 N. M. 354, 423 P. 2d 39

(1967), where four jurors were so affected. In determining due process standards in this area, the Court's attention is invited to ABA Standards Relating to Free Trial and Free Press, Sec. 3.2 and 3.4, recommending a change of venue or continuance where a reasonable likelihood of not getting a fair trial exists, or, as a minimum, that individual voir dire examination be undertaken in such cases.

IV.

In addition to the introduction of illegally seized evidence, admission of a coerced confession, and trial to a jury unfairly exposed to prejudicial publicity, due process standards were violated in the trial of this case because of (a) the prosecution's deliberate elicitation before the jury of inadmissable hearsay evidence of purported misconduct by the Petitioner which involved alleged commission of another offense; (b) deliberate and unwarranted action by the prosecution and the court to deny Petitioner release on bail prior to and during trial; (c) trial with a co-defendant whose defense involved implication of the Petitioner; (d) use of inadmissable evidence of police investigation of Petitioner and opinions concerning narcotics traffic; and (e) improper introduction of critical fingerprint identification evidence.

In *Malinski v. New York*, 324 U. S. 401 (1945), this court defined the role of appellate courts in determining whether due process of law has been afforded to a defendant as being "an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses." In addition to the matters specifically raised

and argued above, the errors referred to in paragraph (2) (c) of the Questions Presented in this Petition merit consideration in order to determine whether the "whole course of the proceeding" offended standards of fairness. Each of the points raised will be briefly discussed.

a. As noted above, during the course of the trial, the prosecuting attorney deliberately asked a question which brought out obviously inadmissible hearsay testimony that the Petitioner was alleged to have monitored the police radio. Such monitoring is, of course, in violation of Federal Law. The testimony was highly prejudicial. The prosecutor must necessarily have known that the hearsay answer would be stricken and the jury instructed to disregard. Knowing that, he deliberately tried to inflame the jury by asking the question anyway. Standard 5.6(b) of the A. B. A. Standards Relating to the Prosecution Function specifically prohibits such action. In Nebraska, it has long been held that such action is wrong; see *State v. Fleming,* 182 Neb. 249, 154 N. W. 2d (1967), where it was held that a simple admonition to disregard did not eliminate prejudice and that the prosecution's mentioning of another offense was grounds for reversal. In *State v. Smith,* 187 Neb. 152, the Nebraska Supreme Court held that a defendant is entitled to be tried by a prosecutor who is fair and impartial to the accused. In allowing the jury to decide this case after having been exposed to this prosecutorial misconduct, an established standard of fairness in Nebraska was violated.

b. The denial of bail was arbitrary and wrongful. There was no justification for increasing bail, and no rational reason for not allowing Petitioner's bondsman to require security in order to post bond. In view of the Petitioner's attempts in the Supreme Court of Nebraska to obtain his release prior to trial, it was wrong to deny

his requested continuance. Under enlightened standards for obtaining pre-trial release, there would seem to be no question but that Petitioner would have obtained release; see A. B. A. Standards Relating to Pre-Trial Release, part V. The District Court apparently felt compelled to apply certain rules against the bonding company; in the process of doing so, it deprived the Petitioner of his right to release.

c. As noted, the Petitioner was compelled to go to trial with a co-defendant, who for eminently practical reasons sought to shift the blame to Petitioner. Under established Nebraska law, a defendant so situated is entitled to a new trial even though no specific objection to consolidation has been made; *State v. Montgomery*, 182 Neb. 737, 157 N. W. 2d 196. A similar Federal ruling is found in *DeLuna v. United States*, 308 F. 2d 140 (C. A. 5, 1962). The situation is comparable to that faced by this court in *Bruton v. United States*, 391 U. S. 123 (1968). It is submitted that where trial with a co-defendant interferes with a person's opportunity to simply defend on the merits of the case against him, a fair trial under established constitutional standards cannot be had.

d. The State offered and was permitted to adduce extensive evidence concerning surveillance of the Petitioner, which informed the jury that he was the subject of concentrated police attention, but had no direct bearing on the issues in the case. Also, a police officer whose sole qualifications were that he had been to a narcotics investigation school and had a few years experience as an officer was permitted to give opinion evidence, apparently as an expert, over objection, regarding practices in narcotics distribution in Omaha, Nebraska. Established Nebraska law regarding expert witnesses, see *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N. W. 2d 601 (1971), pro-

hibits the use of such expert testimony. Petitioner was thus deprived of the benefit of established rules of law in the trial.

e. There was no plausible excuse for permitting the expert to use the 1958 fingerprints allegedly taken from Petitioner as a standard. Fingerprints directly attributable to the Petitioner were claimed to be available. The use of 1958 prints, which were not attributed to defendant under any accepted evidentiary standard, was in flagrant violation of the best evidence and hearsay rules; see *State v. Wickett*, 230 Iowa 1182, 300 N. W. 268, 271 (1941), where the Court stated that a handwriting standard must be directly established as the genuine writing of the subject and not by expert testimony of an out of court comparison. If the recent fingerprints of Petitioner were trustworthy and accurate, the only plausible excuse for using the 1958 prints was to prejudice the jury by showing an earlier police contact, an obviously improper procedure; see *State v. Riley*, 182 Neb. 300, 154 N. W. 2d 741 (1967). The only other plausible reason for using the 1958 print was that the recent print was not reliable. This evidence was crucial in that it purportedly placed the Petitioner at a table where narcotics were found. All of the other evidence concerning activities at the raided house was that he was seated some distance from that table.

The Nebraska Supreme Court simply failed to consider the entire course of conduct in the trial of Petitioner. If it had done so, it seems abundantly clear that under *Malinski v. New York*, supra, review would have revealed a denial of due process of law. In combination with the other matters raised earlier, it is abundantly clear that this Petitioner was convicted in a proceeding which of-

fended those canons of decency and of fairness which express the notions of justice under which criminal defendants are entitled to be tried.

CONCLUSION

The Petitioner was convicted upon evidence seized in an unannounced search conducted under conditions never approved by this Court. A coerced incriminating statement was used against the Petitioner, and in dealing with it, the Nebraska Supreme Court ignored prior decisions of this Court and misconstrued this Court's decision in *Miranda v. Arizona,* supra. In a trial before a jury prejudiced by publicity, the prosecution was allowed to deviate from normal trial practices and procedures and inflame the jury against the Petitioner, in conflict with standards of due process of law. Important issues are raised; a Writ of Certiorari should be granted.

Respectfully submitted,

BILLY R. TORRENCE,
Petitioner

By:
PATRICK W. HEALY
and
DUANE L. NELSON
His Attorneys

APPENDIX

STATE OF NEBRASKA, APPELLEE, V. BILLY R. TORRENCE, APPELLANT.

— N. W. 2d —

Filed July 5, 1974. No. 39200.

1. **Searches and Seizures: Affidavits: Criminal Law.** An affidavit for a search warrant which is based in part upon information supplied by an unidentified informant is sufficient if the affidavit contains a factual basis upon which the reliability of the informant can be determined.
2. **Searches and Seizures: Affidavits: Criminal Law: Trial.** Where the identity of an informant is not relevant or helpful to the defense against the crime charged, the trial court is not required to order the identity of the informant be disclosed.
3. **Confessions: Evidence: Criminal Law: Trial.** Volunteered statements of any kind are admissible without a prior explanation of the defendant's rights.
4. **Jury: Evidence: Criminal Law: Trial.** It is not required that jurors be totally ignorant of the facts and issues involved. It is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Duane L. Nelson, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, NEWON, CLINTON, and BRODKEY, JJ.

BOSLAUGH, J.

The defendant appeals from a conviction for possession of heroin with intent to distribute.

The defendant was arrested on April 6, 1973, as a result of a raid by the police at a residence at 3611 Seward

Street in Omaha, Nebraska. When the police entered the house the defendant was in the living room crouching down near a davenport. There were other persons in the house but no other person was in the living room except the defendant. A large quantity of heroin was found on a table in the dining area which was a part of the living room. The defendant's jacket was on a chair beside the table. It was apparent a packaging operation had been in progress when the raid took place. Small squares of aluminum foil each containing a spoonful of diluted herion were on the table and being folded. The defendant's fingerprint was found on a sheet of glass which was being used in the packaging operation. The evidence was clearly sufficient to sustain the finding of the jury.

The defendant's principal assignments of error relate to the vailidity of the search warrant which was the basis for the raid. A motion to suppress the evidence obtained as a result of the warrant was overruled before the trial commenced.

The affidavit upon which the warrant was issued alleged the defendant had been under investigation by the narcotics unit of the Omaha police division for the past 6 months and that the police had information heroin was being diluted and packaged for distribution by the defendant at 3611 Seward Street in Omaha, Nebraska. The affidavit stated the information alleged therein had been obtained by police surveillance of the defendant, particularly within the preceding 24 hours; from a druggist who had sold large quantities of Dormin (a dilutant) to the defendant on April 4, 1973; from an agent of the Bureau of Narcotics and Dangerous Drugs; and from an unidentified informant. The information supplied by the unidentified informant related to the general method of opera-

tion of the defendant in the "cutting" or dilution of heroin as a part of the packaging and distribution process. The specific information relating to time and place came from the other sources.

The affidavit alleged the informant had a "personal relationship" with the defendant. The affidavit stated the informant had given information in a previous case which had resulted in an arrest for possession of heroin and cocaine on January 14, 1973. This was a factual basis upon which the informant's reliability could be determined. The affidavit was sufficient to support the issuance of the warrant. See, United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed 2d 723; State v. Rice, 188 Neb. 728, 199 N. W. 2d 480.

The defendant's pretrial motion to disclose the name of the unidentified informant was overruled. Where the identity of an informer is relevant and helpful to the defense, disclosure may be compelled. Because of the nature of the evidence used by the State, the identity of the informer was not relevant to the defense against the charge of possession of heroin with intent to distribute. The trial court was not required to order a disclosure of the identity of the informant. See, McCray v. Illinois, 386 U. S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62; United States v. Harris, *supra*.

After the defendant had been arrested and handcuffed, but before he had been removed from the house at 3611 Seward Street, he was struck on the head by an officer using a nightstick. The striking was not necessary to subdue or control the defendant who had been cooperative, and apparently was the result of a misunderstanding by the officer involved. Shortly thereafter Officer

Parker said to the defendant: "Billy, I have been trying to get you for three years and I think I got you." The defendant replied "You got me good, Mr. Parker." The defendant contends the statement was not admissable in the absence of a prior explanation of his right to remain silent.

In Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, the United States Supreme Court held specifically that volunteered statements of any kind are admissable without prior explanation of the defendant's rights. The defendant's reply was equivocal, but in any event it was spontaneous and voluntary in nature and not the result of interrogation. The objection was properly overruled.

On redirect examination the State was allowed to ask Officer Miller, over objection, why the police had not used their radio. Officer Miller answered: "Well, I received information from a party that worked on the North Side that Mr. Torrence had a Police monitor and did receive our radio calls." A motion to strike the answer was sustained and the jury was directed to disregard the statement. A motion for a mistrial was overruled. Striking the answer from the record and admonishing the jury was sufficient. The defendant was not entitled to a mistrial.

The defendant further contends he should have been granted a change of venue because pretrial publicity prevented him from having a fair trial. The voir dire examination of the jury showed that of the jurors selected to try the case, most had not been exposed to pretrial publicity to any appreciable extent. Of the jurors selected, all declared under oath they would not be influ-

enced by what they had read or heard and would base their verdict solely on the evidence.

It is not required that jurors be totally ignorant of the facts and issues involved. It is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. See Irvin v. Dowd, 366 U. S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751.

We have examined the other assignments of error and find them to be without merit. The judgment of the District Court is affirmed.

AFFIRMED.

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,)
Plaintiff,)
vs.)
BILLY TORRENCE,)
Defendant.)

MOTION TO SUPPRESS EVIDENCE

DOC. 87 NO. 131

Comes now the defendant, Billy Torrence, and moves the Court for an order suppressing any purported evidence taken from the defendant herein or from the premises at 3611 Seward Street, Omaha, Nebraska, on the 6th day of April, 1973, and/or testimony in connection therewith for one or more of the following reasons:

1. Any purported evidence or property taken from said residence from the defendant personally was unreasonably, illegally and unconstitutionally received by law enforcement officers and the State without a valid search warrant and without any prior lawful arrest;

2. The law enforcement officers who made such search and seizure did not have probable cause for arrest or search and seizure of the defendant or 3611 Seward Street and same was not incident to a lawful prior arrest of the defendant;

3. Search and seizure of the premises at 3611 Seward Street and/or the defendant made by the law enforcement officers was unreasonable, unlawful and violated one or more of the following constitutional rights of the defendant under the Constitution of the State of Nebraska:

   a) Article I, Section 3, "No person shall be deprived of life, liberty or property without due process of law."

   b) Article I, Section 7, "The right of the people to be secure in their person, houses, paper and affects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

   c) Article I, Section 12, "No person shall be compelled, in any criminal case, to give evidence against himself or be twice put in jeopardy for the same offense."

4. The rights of the defendant under the Constitution and laws of the United States and the State of Nebraska are unreasonably, unlawfully and without probable cause violated by such law enforcement officers under one or more of the following provisions of the Constitution of the United States:

   a) Amendment IV, "The right of the people to be secure in their person, houses, papers and affects against unreasonable search and seizure shall not be violated and no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized.

   b) Amendment XIV, "No state shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States; or shall any state deprive any person of life, liberty or property without due process of law nor deny any person within its jurisdiction to equal protection of the law."

5. The defendant further moves the Court to suppress an evidence purported obtained from the defendant or his premises 2611 Seward, Omaha, Nebraska, by law enforcement officers and the State, if any there be, while the defendant was subsequently unreasonably, unlawfully and unconstitutionally detained by Omaha Police and/or their agents, for the reason that said law enforcement officers of the State denied the defendant herein timely right to bail and to legal counsel in violation of Article I, Section 2, Article I, Section 9 and Article I, Section 13 of the Constitution of the State of Nebraska

and Amendments 4, 5, 6, 8 and 9 of the Constitution of the United States.

BILLY TORRENCE, defendant

By Clayton H. Shrout
Of Shrout, Caporale, Krieger,
Christian & Nestle
1004 City National Bank Bldg.
Omaha, Nebraska 68102
Phone 342-8015

IN THE MUNICIPAL COURT OF OMAHA, DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

SEARCH WARRANT

TO: Omaha Police Officer Melvin M. Berney

WHEREAS, Omaha Police Officer Melvin M. Berney has made affidavit sworn to before me, the undersigned ---------- Judge of the ---------- State of Nebraska, and

Whereas, I am satisfied that there is probable cause to believe that the following grounds exist for issuance of a search warrant, to-wit:

During the past six months members of the Narcotics Unit of the Omaha Police Division have been investigating Billy R Torrence regarding possession of, and Sale of Heroin and other Drugs. Billy R Torrence

lived at 4110 John Creighton Blvd., until about November of 1972 when he moved to his present address of 11122 No 48th Street. An informant of Officer Charles Benak, Informant #1, stated that Torrence moved to 11122 No 48th Street so that he might evade the jurisdiction of the Omaha Police Division. Informant number one's reliability in the past has been proven by the giving of information, which led to the arrest of Ruchelle White for Possession of Heroin and Cocaine on January 14, 1973. Informant number one further relates that Torrence generally does not keep Narcotics in his house, but states that Torrence keeps Narcotics on the premises near the house. Informant number one states further that Torrence is always present when the Heroin is being cut, (diluted) and distributes the Narcotics and cuts the Narcotics at locations away from his residence. Informant number one made the foregoing statements as a result of his personal relationship with Billy R Torrence. Members of the Omaha Police Division, within the past 30 days, have had a continuous surveillance of Billy R Torrence in connection with his Narcotics activity but because of the type operation he conducts, only being around the heroin physically when it is cut up, the officers have not been able to make a solid Narcotics case against him. On April 5, 1973 at about 1100 hours Officers of the Omaha Nebraska Police Division Vice and Narcotics Section received information from Bureau of Narcotics and Dangerous Drugs Agent Jerry Gersham that sometime in the evening of April 5, 1973 Billy Torrence is supposed to be leaving Omaha, Nebraska for about one month but before he leaves Omaha he will be cutting up a supply of Heroin that can be used while he is out of town. Armed with this information members of the Omaha Police Division Vice and Narcotics Unit conducted a

concentrated surveilance on Billy R Torrence starting at about 1110 Hours April 5th 1973. On 4 April 1973 at about 1450 Hours the pharmacists from Dall Pharmacy at 6602 North 30th Street telephoned and advised that a party had just purchased 8 bottles of 72 Capsule Dormin and that this party who purchased this Dormin was the same individual who has purchased Dormin in large quantities at Dall Pharmacy in the past and the pharmacist has identified by mug shots as being Billy Torrence and the party who purchased the 8 bottles of Dormin on April 4, 1973 was driving a pickup truck with the license plate number being 1-Comm 31980 which is registered to B & D Corp 11122 North 48th Street. Dormin is widely used as a cutting agent for Heroin.

Since 1110 Hours April 5, 1973, members of the Omaha Police Division have kept Billy Torrence under constant surveillance and have observed him entering and leaving 3611 Seward Street on different occasions during this time. Between the hours of 0600 and 0700 Hours 6 April 1973, members of the Omaha Police Division Vice and Narcotics Unit have observed several parties enter the residence of 3611 Seward Street and remain there. One of these parties observed entering was Billy Torrence. Officers are of the opinion that this house is the house that Billy is presently using for the cutting up and distributing of illegally possessed Heroin. This house is regularly occupied by a party by the name of Elton Love.

You are, therefore, commanded, with the necessary and proper assistance, to search the following described place or person, to-wit: Billy R Torrence, Elton Love, and/or John Doe, and/or Jane Doe and 3611 Seward Street, Omaha, Douglas County, Nebraska. A Blue and White

wooden framed, single family dwelling for the purpose of discovering and seizing the following described property, to-wit:

Heroin, Cocaine or any other illegally possessed Drugs and Instruments for the administering of the aforementioned drugs either homemade or manufactured and any paraphernalia used for the distribution of illegally possessed Narcotics and if found, to seize and deal with the same as provided by law and to make return of this warrant to me within ten days after the date hereof.

This warrant shall be served in the Daytime.

You are authorized to enter the premises described above without knocking or announcing your authority because I have found from the affidavit that due to toilet facilities inside of this residence that if the Officers have to announce themselves that the contraband being sought could easily be destroyed.

GIVEN under my hand this 6th day of April 1973.

WALTER H. CROPPER
Judge of the Municipal Court,
City of Omaha, Nebraska

